

APPEAL NO. 031837  
FILED AUGUST 28, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 19, 2003. With respect to the single issue before her, the hearing officer determined that the respondent's (claimant) average weekly wage (AWW) is \$682.80. In its appeal, the appellant (carrier) argues that the hearing officer erred in determining that the claimant missed 6 weeks of the 13-week period immediately preceding the injury due to illness. The carrier maintains that the claimant only established that he missed 4 weeks due to illness; thus, it argues that the claimant's AWW should be \$567.22. In his response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.3(g) (Rule 128.3(g)) that the claimant's employment during 6 weeks of the 13-week period immediately preceding the compensable injury was irregular due to illness or in employing a fair, just, and reasonable method to determine that the claimant's AWW is \$682.80, which was calculated by dividing his total wages and fringe benefits by 7, the number of weeks that his employment was regular. The carrier argues that the hearing officer erred in determining that the claimant missed work for the 2-week period from May 6 to May 19, 2002, due to illness. Rather, it maintains that only the 4-week period while the claimant was in the hospital for an appendectomy and the recovery period following that surgery was properly excluded from the calculation of AWW. Thus, it argues that the claimant's AWW should be \$567.22, which is calculated by dividing the claimant's total wages and fringe benefits by 9. The claimant testified that he missed work during the 2-week period at issue in this case because of kidney stones and his appendicitis. Specifically, he stated that the appendicitis was diagnosed after the kidney stones and that the problem with the kidney stones had to be resolved before he could undergo an appendectomy. The hearing officer was free to credit the claimant's testimony and to determine that the claimant's employment in those 2 weeks was irregular due to illness. The carrier cites no authority for the proposition that the claimant was required to provide corroborating documentary evidence to establish his illness during that period and we are unaware of any such requirement. At most, the lack of medical evidence to support the claimant's assertion of illness was a matter for the hearing officer to consider in making her credibility determinations. In that regard, the hearing officer noted that "[t]hough medical records would have been helpful, Claimant's testimony was credible that he missed the additional time from May 6 to May 20th from kidney stones and resulting problems before the appendix problem surfaced and required surgery." The hearing officer was persuaded that the claimant sustained his burden of proving that he had irregular employment in 6 weeks of the 13-week period preceding his

compensable injury. Thus, she turned to the fair, just, and reasonable method and calculated the claimant's AWW by dividing his total wages and fringe benefits in the 13-week period by 7, which yields an AWW of \$682.80. The hearing officer was acting within her province as the fact finder pursuant to Section 410.165(a) in so doing. Nothing in our review of the record reveals that the hearing officer's AWW determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse the challenged determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier's **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge